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In the Supreme Court of the United States

OCTOBER TERM, 1985

ATLANTA GAS LIGHT COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether employees who were denied or overcharged for health insurance benefits by a concededly discriminatory health benefits plan should be denied remedies prescribed by Title VII on the ground that their injuries antedated this Court's authoritative construction of the relevant legislation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 751 F.2d 1188. The December 15, 1983, opinion and order of the district court (Pet. App. B1-B8) is unreported. The district court's August 17, 1982, order (Pet. App. C1-C2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1985. A petition for rehearing was denied on June 3, 1985 (Pet. App. D1-D2). The petition for a writ of certiorari was filed on July 2, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Equal Employment Opportunity Commission (EEOC) filed this action on June 5, 1981, alleging that petitioner Atlanta Gas Light Company's practice of providing unequal spousal medical benefits in its employees' health insurance plan constituted wage discrimination against male workers in violation of Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), as amended by the Pregnancy Discrimination Act of 1978 (PDA), Pub. L. No. 95-555, 92 Stat. 2076 *et seq.*; see 42 U.S.C. 2000e-2(a), 2000e(k) (EEOC Complaint 2). The EEOC's complaint was predicated on charges of sex discrimination filed by nine male employees of the company.

The health insurance plan maintained by petitioner during the period at issue here—between April 29, 1979 (the effective date of the PDA) and June 20, 1983 (the day of this Court's decision in *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669)—covered the medical expenses of its employees free of charge. At an additional monthly rate, an employee could purchase medical benefits for his or her dependents. Pregnancy was specifically excluded from the dependent coverage policy. Any male employee who wished to have medical coverage for the pregnancy-related expenses of his spouse was required to purchase a supplemental policy.[1]

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[1]The dependent coverage policy, which excluded pregnancy, cost an employee $14.10 per month. Defendant's Answers to Plaintiff's First Set of Written Interrogatories, No. 4, at 3. Under the dependent plan, as under the employee plan, medical expenses were reimbursed at the following rates (*id.* No. 12, at 6):

Hospital — 100% of the first $1,000
80% of next $4,000 and
100% of all charges over $5,000 in the

Following this Court's decision in *Newport News,* which held that an employee insurance plan violates Title VII when it disadvantages male workers by providing lesser coverage for spousal pregnancy than for other spousal conditions, the company amended its health insurance plan to provide equal coverage of pregnancies of male employees' spouses.

2. On August 17, 1982, before this Court decided *Newport News,* the district court granted the company's motion for summary judgment on the issue of liability (Pet. App. C1-C2). Following the decision in *Newport News,* the court of appeals on August 16, 1983, summarily reversed the district court's decision in this case (Pet. App. A4).

On remand the district court held that *Newport News* was to be given retroactive effect (Pet. App. B1-B8). The court therefore ruled that the company was liable to those of its male employees electing dependent coverge who, after April 29, 1979, incurred expenses for their wives' pregnancies which were not compensated by the health benefits plan at a level commensurate with normal dependent coverage, and to those male employees who had paid the monthly premium for the supplemental pregnancy coverage. See note 1, *supra;* Pet. App. B4-B5. In holding that *Newport News* applied retroactively to this case, the district court determined that the company had not satisfied the test for nonretroactivity enunciated in *Chevron Oil Co.* v. *Huson,*

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insurance year. (Includes doctor charges and all other medical expenses.)

Doctor — 80% of reasonable charges.

By contrast, the supplemental spousal pregnancy policy cost an additional $7.00 per month and limited coverage to a flat maximum of $225.00, regardless of the actual hospital and doctor expenses incurred (*id.* No. 8, at 5). There were no similar limitations placed on the health benefits of female employees' spouses.

404 U.S. 97, 106 (1971) (Pet. App. B2-B3). Specifically, the district court found that *Newport News* did not involve " 'an issue of first impression whose resolution was not clearly foreshadowed' " (*id.* at B2 (quoting *Chevron Oil Co.* v. *Huson,* 404 U.S. at 106)), because the Court's opinion in *Newport News* indicated that its decision there was clearly foretold by Congress's enactment of the PDA in 1978 (Pet. App. B3).

A unanimous panel of the court of appeals affirmed. Noting that there is a strong presumption of retroactive relief in Title VII cases (Pet. App. A6), the court of appeals concluded that the *Chevron* criteria for nonretroactivity were not satisfied. First, the court held that this Court's decision in *Newport News* was clearly foreshadowed because the PDA " 'ma[de] clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions' " (*id.* at A7 (quoting *Newport News,* 462 U.S. at 684)). Second, the court of appeals held that retroactive application of *Newport News* would further Title VII's goals of making victims of discrimination whole for their losses due to discrimination and would encourage employers to engage in self-evaluation and to correct discriminatory practices before litigation ensues (Pet. App. A7-A8). Third, the court concluded that retroactive relief would not be inequitable, distinguishing *Los Angeles Department of Water & Power* v. *Manhart,* 435 U.S. 702 (1978), and *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans* v. *Norris,* 463 U.S. 1073 (1983), which declined to apply retroactively Title VII sex discrimination holdings regarding pension plans. On this point, the court of appeals noted, first, that Atlanta Gas Light had not made a showing that retroactive liability would lead to the "devastating result" feared in *Manhart* and *Norris,* where "[r]etroactive compensation would have * * * endanger[ed] the solvency of the plaintiffs' own pension fund" or "the fiscal soundness of the plaintiffs'

insurance program," respectively (Pet. App. A8); and, second, that the equities in this case favor retroactive application because the burden of compliance will fall on the discriminator, Atlanta Gas Light Company, and not, as in *Manhart* or *Norris,* on "innocent third parties" like "fellow pensioners," "unwitting taxpayers," or "plaintiffs themselves in the event of insolvency" (Pet. App. A8).

ARGUMENT

Petitioner contends that this Court should review the court of appeals' decision because it was incorrect and the Court's guidance in this area of the law is needed. Because, however, there is no conflict among the circuits, the issue presented is of relatively little significance, and the Eleventh Circuit's decision was in fact correct, review should be denied.[2]

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[2]The Georgia-Pacific Corporation has filed a motion for leave to file an amicus brief, and attached their amicus brief. It raises no important issues not raised in the petition and dealt with in this brief in opposition, save perhaps one: that the presence of a collective bargaining agreement made it unlawful for the district court to order retroactive relief here. It is well established, however, that such a private, contractual agreement cannot change employees' statutory rights under Title VII. *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747 (1976); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974). This is especially so since, as discussed at pages 13-16, *infra,* the health insurance provided here cannot be practically distinguished from more conventional compensation; amicus's attempts to do so are unconvincing since wages are at least as subject to bargaining as are health benefits. Amicus's position would thus bar retroactive relief whenever items that could be bargained over by labor and management were involved—an indefensible result. Finally, this Court's ruling in *H.K. Porter Co.* v. *NLRB,* 397 U.S. 99 (1970), on which amicus solely relies, merely established that the NLRB is without statutory authority to compel labor or management to agree to a substantive contractual provision in a collective bargaining agreement. That decision in no way suggests that private parties may, through contractual agreement, modify statutory requirements that Congress has prescribed. The authority of the NLRB is not at issue here; nor is there any danger that retroactivity here will intrude on labor-

1. Petitioner does not assert that there is, nor is there, any conflict among the circuits concerning the retroactive application of this Court's decision in *Newport News.* Indeed, the only other court of appeals which has considered the issue, in a decision which petitioner fails to cite, reached the same conclusion the Eleventh Circuit did and rejected the argument that *Newport News* should be applied prospectively only. *EEOC* v. *Puget Sound Log Scaling & Grading Bureau,* 752 F.2d 1389 (9th Cir. 1985). Two district courts have reached the same result. *Schiffman* v. *Cimarron Aircraft Corp.,* 38 Fair Empl. Prac. Cas. (BNA) 1245, 1247 (W.D. Okla. Aug. 8, 1985); *EEOC* v. *MTC Gear Corp.,* 595 F. Supp. 712, 715-716 (N.D. Ill. 1984). We are aware of no court having ruled to the contrary.

2. Moreover, the issue presented is of limited importance. Insofar as the illegality of the policy at issue in this case was conclusively established by *Newport News,* the question presented concerns only the appropriate relief required from employers who failed to comply with the Pregnancy Discrimination Act during a circumscribed time period—*i.e.*, at a maximum, between the Act's effective date of April 29, 1979, and June 20, 1983, the date of the *Newport News* decision. The limited effect of the court of appeals' decision is also discussed at pages 14-17, *infra.*

3. Finally, this Court should decline to grant certiorari because the Eleventh Circuit's—and Ninth Circuit's—decision was correct.

In *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 413-425 (1975), this Court established a presumption in favor of

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management relations, since the plan has already been changed. Cf. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 422 n.16 (1975).

We also note that this issue would not appear to be properly encompassed in petitioner's question presented, and was not raised by the parties below.

a "make whole" award of back pay for victims of unlawful discrimination, and "[t]he *Albemarle* presumption in favor of retroactive liability can seldom be overcome * * *." *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. at 719; see also *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans* v. *Norris*, 463 U.S. at 1091-1092 (opinion of Marshall, J.); *id.* at 1105 (opinion of Powell, J.); *id.* at 1110 (O'Connor, J., concurring). Here, as the court of appeals concluded, petitioners have failed to satisfy any of the three criteria governing nonretroactivity of judicial decisions set forth in *Chevron Oil Co.* v. *Huson, supra,* and therefore have not justified the unusual course of denying monetary relief to victims for economic losses suffered as the result of unlawful discrimination.[3]

a. The court of appeals correctly held that *Newport News* did not establish any "new principle of law" within the contemplation of the *Chevron* three-part test (see 404 U.S. at 106) because the decision did not overrule clear precedent upon which Atlanta Gas Light could reasonably have

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[3]The following three considerations, discussed seriatim in the text, pages 7-17, *infra,* bear on the issue of nonretroactivity:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * *. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." * * * Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Chevron Oil Co. v. *Huson,* 404 U.S. at 106-107 (citations omitted).

relied and, furthermore, the holding in *Newport News* was "clearly foreshadowed."

While it is probable that all three *Chevron* criteria must be met for a rule not to be applied retroactively in a civil context,[4] there is an especially strong presumption of retroactivity when there is no "new principle of law."[5] A new principle of law is not created absent a clear break with past practice[6] and, in this case, the ruling in *Newport News* was

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[4]See *Cochran* v. *Birkel*, 651 F.2d 1219, 1223 n.8 (6th Cir. 1981), cert. denied, 454 U.S. 1152 (1982); *NLRB* v. *Lyon & Ryan Ford, Inc.*, 647 F.2d 745, 757 (7th Cir.), cert. denied, 454 U.S. 894 (1981); *Harpp* v. *General Electric Co.*, 571 F. Supp. 426, 432 (N.D.N.Y. 1983); *Rohm & Haas Co.* v. *Dawson Chem. Co.*, 557 F. Supp. 739, 816 (S.D. Tex. 1983). Compare *Cash* v. *Califano*, 621 F.2d 626, 629 (4th Cir. 1980).

[5]*Chevron*, of course, says that the decision "*must* establish a new principle of law" (404 U.S. at 106 (emphasis added)), and this requirement has been treated as a "threshold" test. See *United States* v. *Johnson*, 457 U.S. 537, 550 n.12 (1982); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 495-502 (1968); *Kremer* v. *Chem. Constr. Corp.*, 623 F.2d 786, 788-789 (2d Cir. 1980) (and cases collected there); 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶¶ 0.402 [3.-2-3], 0.402 [3.-2-4], at 73-74, 92-93 (2d ed. 1984).

[6]See, *e.g.*, *United States* v. *Johnson*, 457 U.S. 537, 551-552 (1982):

> [The case at issue] did not announce an entirely new and unanticipated principle of law. In general, the Court has not subsequently read a decision to work a "sharp break in the web of the law," *Milton* v. *Wainwright*, 407 U.S. 371, 381, n.2 (1972) (Stewart, J., dissenting), unless that ruling caused "such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one," *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 498 (1968). Such a break has been recognized only when a decision explicitly overrules a past precedent of this Court, see, *e.g.*, *Desist* v. *United States*, 394 U.S. 244 (1969); *Williams* v. *United States*, 401 U.S. 646 (1971), or disapproves a practice this Court arguably has sanctioned in prior cases, see, *e.g.*, *Gosa* v. *Mayden*, 413 U.S., at 673 (plurality opinion); *Adams* v. *Illinois*, 405 U.S., at 283; *Johnson* v. *New Jersey*, 384 U.S., at 731, or overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly

foreshadowed by the PDA itself, other rulings of this Court, the EEOC's guidelines, and rulings by other federal courts.

The only past precedent of this Court supporting the company's policy is *General Electric Co.* v. *Gilbert,* 429 U.S. 125 (1976), which held that denial of pregnancy benefits did not discriminate on the basis of sex. As this Court emphasized in *Newport News,* however, Congress, through enactment of the PDA, "unambiguously expressed its disapproval of both the holding and the reasoning * * *" in *Gilbert* (462 U.S. at 678), "made clear" that singling out pregnancy for unfavorable treatment in a fringe benefit program is unlawful (*id.* at 684), and thus "foreclose[d] any claim" that a medical insurance plan which provided unequal treatment of spousal pregnancy could legally survive the effective date of the PDA (*id.* at 685). Petitioner concedes (Pet. 13 (footnote omitted)) that *Newport News* said Congress's rejection "of both the holding *and the reasoning* of *Gilbert*" was "clear" (emphasis in petition). In short, this Court concluded that the PDA itself clearly

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approved. See, *e.g., Gosa* v. *Mayden,* 413 U.S., at 673 (plurality opinion) (applying nonretroactively a decision that "effected a decisional change in attitude that had prevailed for many decades"); *Stovall* v. *Denno,* 388 U.S., at 299-300. See also *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 107 (1971); *Cipriano* v. *City of Houma,* 395 U.S. 701 (1969); *Milton* v. *Wainwright,* 407 U.S., at 381-382, n.2 (Stewart, J., dissenting) ("sharp break" occurs when "decision overrules clear past precedent . . . or disrupts a practice long accepted and widely relied upon").

Needless to say, none of these criteria is met here.

The government believes that a distinction should be made between retroactivity in a civil context like this one, where retroactivity involves the provision of remedies for violation of statutory rights, and retroactivity in a criminal context like *Johnson,* where it involves deterrence of police misconduct. The conclusion to be drawn from this, however, is that the principles stated in *Johnson* apply *a fortiori* to this case.

foreshadowed the resolution reached in *Newport News.* (See also the Eleventh Circuit's decision, Pet. App. A7.)[7]

Even before *Newport News,* this Court had held on several occasions in the equal protection context that less favorable provision of benefits to spouses of female employees constituted sex discrimination not only against the spouses but against employees. See *Puget Sound,* 752 F.2d at 1391 (citing *Califano* v. *Goldfarb,* 430 U.S. 199, 208-209 (1977); *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 645 (1975); *Frontiero* v. *Richardson,* 411 U.S. 677, 688 (1973); *Wengler* v. *Druggists Mutual Ins. Co.,* 446 U.S. 142, 147-149 (1980)). This Court itself made this point in *Newport News,* 462 U.S. at 682-683 n.22. These cases further foreshadowed *Newport News.*[8]

Moreover, prior to the six-month grace period provided by Congress for compliance with the PDA (see Pub. L. No. 95-955, § 2(b), 92 Stat. 2076), the EEOC published PDA guidelines in the form of questions and answers in order to give notice to " 'all interested parties * * * of EEOC's view of their rights and obligations in advance of April 29, 1979 [the PDA's "fringe benefit" effective date], so that they may

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[7]Petitioner erroneously suggests that the EEOC conceded at oral argument in *Newport News* that the PDA is unclear (Pet. 13). What counsel said was that one portion of the legislative history—a passage of a Senate report (S. Rep. 95-331, 95th Cong., 1st Sess. 6 (1977))—did not speak "with absolute clarity." Oral Argument Transcript 25. Counsel concluded, however, that the legislative history as a whole was "remarkably consistent in rejecting the rationale of *Gilbert*" (*id.* at 29 (emphasis added)), and that the opposing claim that the legislative history invited application of *Gilbert* to spousal pregnancy benefits had "no basis" (*id.* at 28-29).

[8]Thus, the situation here is as it was in *Brown* v. *Louisiana,* 447 U.S. 323, 335 (1980): "Unlike other cases that have been accorded prospective effect only, [the case at issue] did not overrule any prior decisions of this Court or invalidate a practice of heretofore unquestioned legitimacy" (plurality opinion) (citations omitted).

be in compliance by that date.' " *Newport News,* 462 U.S. at 673 n.8 (citation omitted). "Two of those questions, numbers 21 and 22, made it clear that the EEOC would consider [a plan such as petitioner's] * * * unlawful" (*id.* at 673). These guidelines, which constituted "[t]he administrative interpretation of the Act by the enforcing agency," would be given "great deference" by the courts—*Griggs* v. *Duke Power Co.,* 401 U.S. 424, 433-434 (1971); see also *Albemarle,* 422 U.S. at 430-431—which petitioner could have and should have foreseen.[9] Thus, the guidelines further foreshadowed the interpretation of the PDA ultimately endorsed by this Court. See *EEOC* v. *Puget Sound,* 752 F.2d at 1391.

Finally, petitioner's claim of "reliance on the great weight of [then] current [lower court] jurisprudence" (Pet. 15) in maintaining its discriminatory policy after passage of the PDA cannot withstand scrutiny. The first decision

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[9]The EEOC has principal enforcement responsibility for Title VII with respect to private employers. See 43 Fed. Reg. 19807 (1978), with accompanying Exec. Order No. 12,067, 43 Fed. Reg. 28967 (1978) (Executive Branch reorganization of 1978). See also 42 U.S.C. 2000e-12.

Petitioner argues (Pet. 13-14) that *Newport News* was not clearly foreshadowed by EEOC guidelines because certain other interpretations of the EEOC had been rejected in *General Electric Co.* v. *Gilbert,* 429 U.S. at 141-145, and *Los Angeles Department of Water & Power* v. *Manhart,* 435 U.S. at 719-720 n.36. In those cases, though, the guideline at issue was discounted because, variously, it was not a contemporaneous construction of the statute, it contradicted an earlier position of the EEOC, there was a differing position of the Wage and Hour Administrator with respect to whether the practice at issue was unlawful, and the legislative history conflicted with the EEOC's interpretation. In contrast, the EEOC guideline involved here was issued contemporaneously with the statute, represented a consistent EEOC policy, was the sole administrative pronouncement concerning the PDA, and was held by this Court in *Newport News* to be correct under the statute and its legislative history. See *Nashville Gas Co.* v. *Satty,* 434 U.S. 136, 142-143 n.4 (1977) (citing an EEOC guideline as support and distinguishing *Gilbert*).

adopting the Company's view that a policy such as it followed was not discriminatory was rendered in February 1981, more than two years after the Act's passage and nearly two years after promulgation of EEOC's guidelines discrediting the policy. *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC,* 510 F. Supp. 66 (E.D. Va. 1981). For this period of time, then, petitioner had no excuse for disregarding the EEOC guidelines. Moreover, less than a year later, the Fourth Circuit had reversed that decision, and the case law which developed from that point on was conflicting. See Pet. 11-13. Conflicting case law does not "generally provide the 'justified reliance' necessary to warrant withholding retroactive application of a decision construing a statute as Congress intended it" (*United States* v. *Estate of Donnelly,* 397 U.S. 286, 295 (1970)),[10] and this would seem particularly true where the conflicting law developed only some time after the appropriate administrative agency had clearly notified employers of the statute's proper interpretation. *Puget Sound,* 752 F.2d at 1392.[11] While the outcome of a lawsuit is never a foregone conclusion, petitioner was

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[10] *Chevron* indicated that the past precedent relied on had to be "clear" (404 U.S. at 106); see also *United States* v. *Johnson,* 457 U.S. at 551 (requiring a "near-unanimous body of lower court authority"); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481, 495-502 (1968); *Perez* v. *Dana Corp.,* 718 F.2d 581, 585 (3d Cir. 1983); *EEOC* v. *MTC Gear Corp.,* 595 F. Supp. 712, 714-716 (N.D. Ill. 1984).

[11] The lower courts which reached a conclusion contrary to this Court in *Newport News* premised their holdings on the theory that *Gilbert* retained viability—a premise which petitioner concedes (Pet. 13) this Court held in *Newport News* to be clearly wrong. See, *e.g.*, *EEOC* v. *Lockheed Missiles & Space Co.,* 680 F.2d 1243, 1246-1247 (9th Cir. 1982), vacated and remanded in light of *Newport News,* 463 U.S. 1202 (1983); *EEOC* v. *Joslyn Mfg. & Supply Co.,* 706 F.2d 1469, 1479, vacated in light of *Newport News,* 724 F.2d 52 (7th Cir. 1983); *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC,* 510 F. Supp. 66, 71 (E.D. Va. 1981), rev'd, 682 F.2d 113 (4th Cir. 1982) (en banc), aff'd, 462 U.S. 669 (1983).

certainly on notice that its practice ran a great risk of being held illegally discriminatory and, especially in the Title VII context, that should be enough. Therefore, *Newport News* cannot be considered to have created "a new principle of law" within *Chevron,* notwithstanding some confusion on the part of the lower courts.[12]

b. With respect to the second *Chevron* factor, retroactive application of *Newport News* will, as the court below held (Pet. App. A8), certainly further the purpose of the rule in that case. *Newport News* held that a health benefits policy like petitioner's discriminated against male workers on the basis of sex. In asserting that withholding of damages will "neither further[] nor hinder[]" the purpose of this holding (Pet. 15), petitioner ignores the fact that one "purpose of Title VII [is] to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co.* v. *Moody,* 422 U.S. at 418. And "where a legal injury is of an economic character," " '[t]he injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.' " *Id.* at 418-419 (quoting *Wicker* v. *Hoppock,* 73 U.S. (6 Wall.) 94, 99 (1867)). Here, monetary awards to victims of petitioner's unlawful employment policies are necessary to reimburse them for the sums they were unlawfully forced to expend for pregnancy-related medical costs and insurance premiums.

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[12]Although the Ninth Circuit had reached a result contrary to *Newport News* in *EEOC* v. *Lockheed Missiles & Space Co., supra,* that court of appeals had little difficulty in concluding that the employer in *Puget Sound* did not justifiably rely on precedent in failing to provide comprehensive spousal pregnancy benefits to male employees. 752 F.2d at 1391-1392. Chief Judge Browning, who was a member of the panel which decided *Lockheed,* was also a member of the undivided panel which decided *Puget Sound.*

Moreover, as the court of appeals pointed out, retroactive application also helps achieve the ends of Title VII by encouraging employees to " 'self-evaluate' " and " 'shun practices of dubious legality' " even before they are challenged in litigation (Pet. App. A7-A8 (quoting *Albemarle*, 422 U.S. at 417-418)). Conversely, without retroactivity an employer has "little incentive" to shun these practices and self-evaluate. *Albemarle*, 422 U.S. at 417-418.[13]

c. The court of appeals also properly concluded that the third *Chevron* criterion was not satisfied because retroactive application of *Newport News* is not inequitable (Pet. App. A8).

In support of its contention that inequitable results will ensue, petitioner relies upon this Court's decisions in *Los Angeles Department of Water & Power* v. *Manhart, supra,* and *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans* v. *Norris, supra.* But petitioner's reliance on *Manhart* and *Norris* has, really, no basis. The Court concluded that retroactivity would be inequitable in those cases because it would have a potentially "devastating" (*Manhart,* 435 U.S. at 722; *Norris,* 463 U.S. at 1106) effect on the pension plans at issue there, and could ultimately harm "innocent third parties" (*Manhart,* 435 U.S. at 723; see *Norris,* 463 U.S. at 1107). Here, however, there is no evidence that the effect will be "devastating," nor that any "innocent third parties" will be harmed. (See Pet. App. A8.)[14]

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[13]The petitioner's interpretation of the second *Chevron* prong makes it indistinguishable from the first (Pet. 14-15). Moreover, by finding the second criterion absent since all employers now know what the rule is, it would preclude the criterion's application in *every* case.

[14]Petitioner ignores the extraordinary factors present in *Norris* and *Manhart,* saying, "The Court gave its holding [in *Manhart*] only prospective application because conscientious fund administrators may

This is true partly because the money at stake here is likely to be less than the "$817 to $1,260 million annually for the next 15 to 30 years" in *Norris*, 463 U.S. at 1106 (footnote omitted), or the "$400 billion * * * increasing by almost $50 billion a year" at issue in *Manhart*, 435 U.S. at 721 (footnote omitted).[15] But it is also true because health plans are

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have assumed that such a plan was lawful" (Pet. 16 (citation omitted)). Of course, had this been the Court's sole rationale for *Manhart*, it would have amounted to a sub silentio reversal of *Albemarle*'s ruling that an employer's "good faith" alone is not enough to block retroactivity.

[15]The only employers affected by *Newport News* are those who failed to heed EEOC guidelines mandating equal treatment of spousal medical benefits during the limited time period at issue here. Cf. *EEOC* v. *Puget Sound*, 752 F.2d at 1393 ("Retroactivity in this case would involve reimbursement only in a relatively small number of specific instances where a male employee and his spouse have privately financed pregnancy related expenses which would have been covered for a female employee and for which they had no other health insurance coverage"). The amount of back benefits due to be paid by such employers depends, inter alia, upon the number of pregnancies experienced by their male workers' spouses between April 29, 1979, and June 30, 1983, and the differences in treatment between spousal pregnancy and other spousal conditions under the employer's health insurance plan. The variety in health insurance plans in place at the time the PDA was being considered was one reason that Congress concluded it was unable to estimate the costs of bringing those plans into compliance with the Act. See S. Rep. 95-331, 95th Cong., 1st Sess. 9-10 (1977). Petitioner failed to submit any evidence indicating the cost of the relief ordered in this case.

An amicus, Georgia Pacific Corporation, who filed a brief for the first time in support of Atlanta Gas Light's petition for rehearing in the court of appeals, states in its brief here that it estimates the nationwide costs of retroactive relief at "approximately $16 billion." Amicus Br. 2. This cost estimate, based on data outside the record and on extrapolations therefrom, is faulty for several reasons, including: (1) it assumes without support that *all* employers chose not to comply with the PDA; (2) the estimate of births used in the cost estimate is unreliable because the average number of *lifetime* births per 1,000 wives as of 1980 was unjustifiably extrapolated to arrive at an assumption that half of the wives of 32 million civilian male employees *of all ages* would have had at least one live birth in the four-year period involved in this case; and (3) it assumed, without any supporting data, that these male employees

fundamentally different from pension plans. Employees ("innocent third parties") are not effectively tied to a given health plan the way they are to a pension plan.[16]

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would have incurred $1,000 in uncompensated costs per birth. In any event, as discussed in the text, page 17, *infra,* the cost will be no more inequitable than any large back pay award.

[16]The similarity between pension plans and health benefit plans, emphasized by petitioner (Pet. 17-18), is therefore more apparent than real. Petitioner argues that "both are based on risk allocation" (*id.* at 17), but that is irrelevant, and has nothing to do with the extraordinary dislocations and injury to third parties which led to *Norris* and *Manhart* being given only prospective allocation. Petitioner also argues that, had it known that its policies were illegal, it could have charged its employees more for their insurance all along to cover the added coverage it should have been giving; thus, it argues that, as in *Manhart,* retroactive relief may net the victims of discrimination more than their due (Pet. 17-18). The trouble is that an argument like this can always be made in back pay situations, which is essentially what this case presents (see page 17, *infra*). That is, defendant can always argue that he would not have given victims as much (money or benefits) as he originally gave the nonvictims since that would have been too expensive. Petitioner may be right, but courts have not made this sort of speculative calculation in other back pay cases, nor have they held that it is unfair to charge a defendant back pay when it had hired and paid a nonminority after refusing to hire a minority, and there is no reason why they should do so here, either; it would make even less sense for a court to decline to award back pay *at all* in this situation, which is what petitioner is asking for. The court of appeals in *Puget Sound* answered a similar contention there, stating (752 F.2d at 1394):

> Even in the face of the significant warnings we noted above and despite phase-in time for compliance allowed by the PDA * * *, [the employer] gambled that the EEOC regulations were incorrect and that nonemployee spouses need not be fully insured. [The employer] chose to provide minimal coverage, knowing that the minimum might be found to be unlawful; it cannot now complain that it is being required retroactively to compensate the employees for risks it had opportunity and good reason to insure from the beginning.

Finally, since insurance companies set rates to cover the number of anticipated costs plus a profit, it is not at all clear that companies which did not change their coverage until *Newport News* will not still gain financially merely by paying the real costs of actual pregnancies retroactively. The government argued that this was the case in *Puget Sound.*

Requiring petitioner to reimburse those employees discriminated against here for health benefits has no practical or conceptual difference from a requirement that it reimburse employees discriminated against for salary. Health benefits and salary are both ways to compensate employees. Back pay liability will fall on the employer here no differently than it does on any adjudged wrongdoer under Title VII. Equity does not require that discrimination be unremedied when its magnitude becomes sufficiently great. Nonretroactivity here would enlarge the *Manhart* and *Norris* exceptions so that they swallow the *Albemarle* rule—something that the former cases made clear they were not doing. *Manhart*, 435 U.S. at 723; *Norris*, 463 U.S. at 1105.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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